No. 91-1069

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

J. G. BOSWELL COMPANY,
Petitioner,

v.

KEN WEGIS, JACK THOMSON, and
JEFF THOMSON,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fifth Appellate District

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents' opposition fails to come to grips with the fundamental argument supporting certiorari in this case: the need to resolve the conflict in the lower courts over the proper application of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Nor does it dispute the overriding economic and social injury caused by systemic failures to subject punitive damages awards to careful, objective scrutiny. Similarly, respondents do not even attempt to defend the constitutional propriety of a $10.5 million punitive damages award for mere anxiety caused by petitioner's filing of a lawsuit. That award represents nothing more than the irrational product of a jury found to have been motivated by passion and prejudice and fails any objective or comparative test of reasonableness.

Instead, respondents present a lengthy exegesis on California's generally applicable trial and appellate procedures that do not even purport to constrain the discretion of juries in awarding punitive damages. Like the California Supreme Court, respondents misconceive the nature of the constitutional problem, namely, the absence of meaningful and objective standards of review designed to guard against arbitrary and excessive punitive damages awards.

I. THE PETITION PRESENTS SIGNIFICANT CONFLICTS REQUIRING IMMEDIATE RESOLUTION BY THIS COURT

As demonstrated in the petition, there is a split among the lower courts over the proper meaning of *Haslip* and the types of punitive damages procedures that pass constitutional muster. Specifically, the courts disagree as to the constitutionality of two particular features common to many punitive damages schemes: (1) the "passion and prejudice" standard of review of punitive damages awards; and (2) the failure to require trial courts to explain on the record their reasons for refusing to set

aside such awards. The disagreements over these two features present important conflicts warranting this Court's review.

Respondents' opposition relegates the "passion and prejudice" conflict to a single footnote in which they emphasize the minor differences in the various punitive damages review standards that have been the subject of conflicting decisions. See Opp. at 27 n.22. This effort fundamentally misconstrues the nature of the conflict presented in the petition.[1] There is a growing and clear dispute over the basic question whether *Haslip* requires effective mechanisms for appellate review based upon detailed and objective criteria or whether systems using vague and

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[1] Respondents' attempt to parse the language of the various "passion and prejudice" formulations merely results in distinctions that are as amorphous as the standards themselves. Thus, their attempts to distinguish *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), and *Fleming Landfill, Inc. v. Garnes*, No. 20284 (W. Va. 1991), are completely unavailing. In *Johnson*, the Fourth Circuit invalidated Virginia's post-verdict review standard, under which "a punitive damages award is deemed 'excessive' and deserving of the granting of a new trial *nisi* remittitur when 'the amount is so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice.'" 949 F.2d 1350 (citation omitted). Similarly, in *Fleming*, the Supreme Court of West Virginia struck down a standard that allowed courts to set aside only those punitive damages verdicts that are "monstrous, enormous, beyond all measure, unreasonable, outrageous and manifestly show jury passion, impartiality [sic], prejudice or corruption" or that have "no foundation in the evidence so as to evince passion, prejudice or corruption in the jury." Slip op. at 21 (citations omitted). The courts in both *Johnson* and *Fleming* replaced the unconstitutional standards with the post-verdict review procedures found in *Haslip* to comply with due process. In California, "[a]n award of punitive damages will be reversed as excessive 'only when the entire record viewed most favorably to the judgment indicates the award was rendered as the result of passion and prejudice.'" *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 208 (1984) (citation omitted). This standard is the functional equivalent of those renounced in *Johnson* and *Fleming*, and thus the latter decisions are fundamentally inconsistent with the cases, including this one, that have sustained the California standard.

indefinite tests like California's "passion and prejudice" standard are constitutionally acceptable. On this crucial point the decisions in *Johnson* and *Fleming* are not only inconsistent with the decision below, but also conflict with a host of rulings in other jurisdictions upholding similarly amorphous standards (Pet. at 9).[2]

While the opposition concerns itself only with California, the conflict articulated in the petition has national significance. Many states employ indeterminate and unstructured standards of review of punitive damages awards analogous to those sustained by the California courts, but rejected by the *Johnson* and *Fleming* courts.[3] Accordingly, the Court's decision in this case would result in meaningful mechanisms for review in a number of state punitive damages systems in addition to California's, as well as obviate the severe economic consequences

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[2] Respondents also fail to refute the inconsistency between this case and *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991). Contrary to respondents' contention, the *Gamble* court did not find the South Carolina system of awarding punitive damages "sufficiently reasonable to withstand constitutional challenge." Opp. at 28 n.22. Rather it found only that the particular award at issue withstood constitutional attack. The significance of the case is that the court, like the courts in *Johnson* and *Fleming*, concluded that *Haslip* required it to conform South Carolina's post-trial procedures for scrutinizing punitive damages awards to those upheld in *Haslip*.

[3] See, *e.g.*, *Romero v. Mervyn's*, 784 P.2d 992, 1002 (N.M. 1989) ("sympathy, passion and prejudice"); *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803-04 (Pa. 1989) ("shock the court's sense of justice"); *O'Neal Ford, Inc. v. Davie*, 770 S.W.2d 656, 659 (Ark. 1989) ("shocks the conscience of the court" or "passion and prejudice"); *Villella v. Waikem Motors, Inc.*, 543 N.E.2d 464, 469 (Oh. 1989) ("passion and prejudice"); *Fowler v. Mantooth*, 683 S.W.2d 250, 253 (Ky. 1984) ("passion and prejudice"); *Harriss v. Elliott*, 565 N.E.2d 1041, 1044 (Ill. App. Ct. 1991) ("passion, partiality, or corruption"); *Archem, Inc. v. Simo*, 549 N.E.2d 1054, 1061 (Ind. Ct. App. 1990) ("sympathy, passion and prejudice"); *Olson v. Walker*, 781 P.2d 1015, 1020-21 (Ariz. Ct. App. 1989) ("shock the conscience of the court" or "passion and prejudice").

resulting from the arbitrary and excessive awards—like the award in this case—currently imposed under those systems (Pet. at 11-12).

Respondents also fail to negate the significant conflict over whether due process requires trial judges to specify reasons in the record for refusing to set aside a punitive damages award. The state supreme courts in both *Fleming*, slip op. at 28, and *Gamble*, 406 S.E.2d at 354, felt obliged by *Haslip* to alter their state procedures to require trial courts to set forth findings on the record. And the courts in both *American Employers Ins. Co. v. Southern Seeding Serv. Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991), and *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991), found summary denials similar to the trial court's in this case to be inconsistent with *Haslip* and remanded to the trial courts for an explanation of their reasons for upholding the awards. These cases are fundamentally incompatible with this case, in which the trial judge failed to specify his reasons for upholding the mammoth $10.5 million award.[4]

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[4] Respondents' assertion that "the trial court in the instant case made specific findings" (Opp. at 21 n.17) is entirely unfounded. The trial judge merely reiterated its conclusion that the punitive award bore a reasonable relationship to the compensatory award and that it was neither excessive nor the product of passion and prejudice. Pet. App. at 68a. These conclusory recitations fail to measure Boswell's conduct against any objective standards or comparative reference points that might explain why such conduct justified an award as high as $10.5 million. Because petitioner did not have an opportunity to raise this issue until *after* the trial court's opinion, it was not required to be raised at the trial stage. In any event, Boswell did raise a constitutional challenge at both the trial and appellate levels to the panoply of California's procedures governing the award of punitive damages.

II. CALIFORNIA FAILS TO PROVIDE MEANINGFUL AND ADEQUATE REVIEW OF PUNITIVE DAMAGES AWARDS

Contrary to respondents' contention, petitioner does not seek "to have this Court abolish common law systems," or impose "a rigid system of ratios and limits" (Opp. at 29). Nor does the petition maintain that the specific Alabama procedures upheld in *Haslip* are the only constitutionally correct procedures for awarding punitive damages (Opp. at 8-10). Rather, it argues that *Haslip* established certain broad principles governing the award of punitive damages and that three specific elements of the California system contravene those principles. Those features are (1) the "passion and prejudice" standard of review; (2) the failure to require trial judges to specify in the record their reasons for refusing to reverse or reduce punitive damages verdicts; and (3) the failure to allow reviewing courts to engage in a comparative analysis of awards imposed in similar cases.[5] Each of these defects frustrates the basic due process requirement that the punitive damages system "impose[] a sufficiently definite and meaningful constraint on the discretion of [the] fact finders in awarding punitive damages." *Haslip*, 111 S. Ct. at 1045.[6]

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[5] Respondents spend a large portion of their brief defending the constitutionality of California's jury instructions on punitive damages. But petitioner's procedural due process challenge is directed primarily to California's overly deferential process of post-verdict review. It is worth noting, however, that respondents utterly fail to refute petitioner's argument that the instructions provide neither an objective nor a meaningful constraint on the jury's discretion. See Pet. 14-16. While respondents note that the instructions were revised in 1989 (after the trial in this case), those revisions did not substantively change the instructions—much less remedy their defects. *Ibid.*

[6] Respondents' opposition focuses in broad-brush fashion on California's procedures, but ignores the flagrant unconstitutionality of the award itself in this case. Like the trial and appellate courts, respondents never explain how the jury's passion and prejudice could have affected its compensatory award, but not its punitive

1. Respondents' primary argument is that California's civil procedures "taken as a whole" overcome the facial inadequacy of a system founded on "passion and prejudice" review of punitive awards. Opp. at 11, 18.[7] But these procedures do not even purport to place a substantive check on the jury's broad discretion in determining the amount of punitive damages awards. See *Johnson*, 949 F.2d. at 1350-51 (the existence of a statutory cap that places a substantially low ceiling on punitive damages awards—$350,000—does not remedy the defects of Virginia's deferential review of punitive awards). Similarly, respondents' detailed analysis of the general characteristics of California's post-verdict review system (Opp. at 18-19) has nothing to do with the absence of objective, substantive criteria against which jury awards of punitive damages may be measured.[8]

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one. If prejudice infected the more mechanical process of assessing compensatory damages, it defies logic and explanation that it did not affect the far more discretionary punitive award—the *very* vehicle by which the jury expresses its outrage at the defendant. Similarly, respondents fail to explain why a 17.5 to 1 ratio of punitive to compensatory damages is reasonable in this case or why the nature of Boswell's conduct—even assuming that it caused "shock and depression with extended sleepless periods"—justified a massive penalty of $10.5 million.

[7] The general procedural safeguards upon which respondents rely include Cal. Civ. Code § 3295(c) (prohibiting discovery of sensitive financial information under certain circumstances); Cal. Civ. Code § 3295(d) (a bifurcation provision); Cal. Civ. Code § 3294(a) (a "clear and convincing" evidentiary standard); and Cal. Civ. Proc. Code § 657(5),(6) (permitting a party to move for a new trial).

[8] Only two of the post-verdict cases upon which respondents rely even involve punitive damages awards. See *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991), and *Neal v. Farmers Ins. Exchange*, 582 P.2d 608 (Cal. 1978). And those cases only emphasize that "[t]he California standard of review appeals to be similar to those as to which the high court noted its concern [in *Haslip*]." *Adams*, 813 P.2d at 1356 n.9.

Respondents have confused the *procedural* opportunity for review of punitive damages awards, with the *substantive* elements of that review. The fatal flaw in California's scheme is not that trial and appellate courts fail to review punitive damages verdicts, but that they fail to review them pursuant to detailed, objective standards to "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 111 S. Ct. at 1045.

While California reviewing courts purport to consider the same three "objective" factors considered by California juries, that fact is of no consequence. For the same reasons that these factors are far too limited in specificity to guide and constrain juries (see Pet. at 14-16), they are wholly insufficient to provide the basis for meaningful review of punitive damages awards. The "reprehensibility" factor is far too nebulous a term to provide any substantive guidance. The "wealth test" that respondents' praise has already been condemned by this Court. And the "reasonable relation to" injury test is hopelessly ineffective in the absence of any objective or comparative touchstones to implement the hortatory language.[9]

Significantly, the courts in Virginia and West Virginia consider similar factors in determining whether awards are the result of passion and prejudice.[10] The courts in

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[9] Because California does not require trial judges to specify their reasons for refusing to set aside punitive damages awards, its procedures do not even ensure that the three minimal factors are applied. Moreover, California reviewing courts use the three factors only with the limited goal of determining whether an award is the result of passion and prejudice, as opposed to the goal of determining whether the award reasonably furthers the ends of punishment and deterrence.

[10] See, *e.g.*, *The Gazette v. Harris*, 325 S.E.2d 713, 746-47 (Va. 1985) (considering actual damages sustained, the nature of the wrongful act, and the defendant's wealth); *Wells v. Smith*, 297 S.E.2d 872, 879 (W.Va. 1982) (considering the nature of the de-

Johnson and *Fleming*, however, did not find these factors sufficient to cure the constitutional infirmity of those states' "passion and prejudice" standards. Thus, California's three "objective" factors are no substitute for the system of meaningful appellate review mandated by due process.[11]

2. Respondents cannot justify California's refusal to require trial courts to specify in the record their reasons for not reversing or reducing punitive damages awards. They argue only that such an explanation is unnecessary because an appellate court can apply the same factors as the jury did. Opp. at 20 n.17. But without a statement of reasons, the appellate court cannot ensure that the trial court actually performed the requisite review. Nor can it engage in meaningful substantive review of the trial court's decision. There can be no more significant procedural requirement for realizing due process guarantees than a statement of reasons. *Cf. Atchison, T. & S. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973). The presence of a clear conflict on this discrete, but fundamental, issue independently merits Supreme Court review. See page 4, *supra*.

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fendant's act); *Muzelak v. King Chevrolet, Inc.*, 368 S.E.2d 710, 715 (W.Va. 1988) (considering the defendant's wealth and the punitive award's relationship to the compensatory award).

[11] Respondents' suggestion (Opp. at 20) that the "efficacy" of California's review system is proven by the substantial reduction of the compensatory damages award against petitioner is absurd. That California courts may engage in effective review of *compensatory* damages awards pursuant to well defined, substantive common law standards proves nothing concerning the effectiveness of their review of discretionary *punitive* damages awards. Respondents cite *Devlin*, *supra*, in which the court noted that punitive damages awards were reversed in six of sixteen California decisions. 202 Cal. Rptr. at 211-14. The *Devlin* court, however, stressed that its review of this issue was "neither a comprehensive nor a scientific survey." *Id.* at 209 n.5. In any event, the fact that California courts sometimes reverse punitive damages awards obviously does not negate the *ad hoc*, unpredictable and inequitable nature of California's punitive damages system.

3. Finally, respondents cannot deny that California's prohibition against comparing punitive damages awards imposed in similar cases is inimical to any sensible, objective review of jury discretion. Respondents' argument that the rule "is often observed more in the breach" (Opp. at 21) is, unfortunately, incorrect. The only decision cited for this proposition is *Devlin*, *supra*. But there the court compared only the *ratios* of punitive to compensatory awards in other cases. It did not compare the *conduct* involved in other cases to determine whether the amount of the award at issue was reasonable.[12] Moreover, the opinion in fact stressed the absence of *any* predictable ratio of compensatory to punitive awards in California, pointing out that "[c]ourts have affirmed punitive damages awards with a ratio as high as 2000 to 1." 202 Cal. Rptr. at 210. Indeed, the *Devlin* court itself upheld an award of punitive damages almost 27 times the amount of compensatory damages. *Ibid.* California's prohibition against comparative review is at odds with the core objectives of *Haslip*, and is a compelling reason to review the constitutionality of a system already suspect because of its lack of constraints on jury discretion and its overly-lax "passion and prejudice" review standard.

Respondents argue that it is often not easy to compare the misconduct involved in different cases. Opp. at 21-22. Respondents cannot, however, dispute that comparative analysis advances the constitutional requirement of an evenhanded, rational and predictable punitive damages system. Respondents further contend that comparative

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[12] For similar reasons, there is absolutely no merit to respondents' claim that the Court of Appeal in this case engaged in a comparison of awards in other cases (Opp. at 21). The court merely cited ratios in other cases to prove the point that "[t]here is no rigid formula to use in determining whether the compensatory damages awards are in a particular ratio with the punitive damages awards." Pet. App. at 53a. It did not compare the conduct in other cases to the conduct in this one to determine whether the award below was reasonable and in line with other awards in the State.

analysis is ineffective because unpublished appellate opinions are unavailable for comparison. Opp. at 22. But one wrong—California's pervasive practice of failing to publish punitive damages decisions—cannot be used to justify another—its failure to mitigate the wholly arbitrary and capricious character of its punitive award system.

In sum, review is required to resolve the substantial conflicts among the lower courts over the correct interpretation of *Haslip*, to overturn the outrageous award in this case, and to repudiate the overly deferential and standardless review procedures followed in California and a number of other states.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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